


The Ethical Challenges of the Marketplace

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INTRODUCTION

THE ETHICAL CHALLENGES OF THE MARKETPLACE

*Eduardo M. Peñalver**

The collection of articles in this issue of the *Cornell Journal of Law and Public Policy* is the latest in a series of collaborations between two great law schools: Tel Aviv University's Buchmann Faculty of Law and Cornell Law School. The partnership between Cornell Law School and Tel Aviv University is the result of the very generous support of two of our alumni, Bob Deiner and David Litman, both Cornell Law School Class of 1982. One of the goals of their philanthropy has been to foster intellectual and personal collaborations between the faculties of our two law schools. With their support, this partnership now extends back over a decade and has—during that time—involved dozens of our respective faculty members and scores of exchange students. Obviously, there are friendships between members of our two faculties that precede this formal institutional relationship. But it is safe to say that the many reciprocal visits between Tel Aviv and Cornell over the years, as well as the several joint conferences (including this one) that we have held under the auspices of this partnership, have deepened those existing friendships, and have facilitated many new ones.

The topic of this symposium issue is the ethical challenges of the marketplace. I suppose it is not surprising that this is the topic that emerged from a collaboration between Hanoch Dagan and Gregory Alexander, the co-organizers of this symposium, and two leaders of the Progressive Property movement. I cannot imagine a more engaging topic.

An exciting symposium topic is sometimes just an intellectual tease—a promise never fulfilled. Symposium papers all too often merely pay lip-service to the putative theme while recycling or repurposing ideas generated for other venues. It is the uncommon symposium where the papers all hang together and hew to the proposed topic. In this case, the participants have produced a fascinating set of original papers that genuinely live up to the gathering's vitally important theme.

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In thinking about the ethical challenges of markets, a number of interlocking questions arise, and this symposium has papers that engage deeply with each of them. At the most basic level is the question whether the notion of the market's ethics represents a kind of category mistake. Some commentators have argued that "the market" as a whole is devoid of moral content beyond the ethics of individual transactions. In their paper on "Just Prices," Bob Hockett and Roy Kreitner recount Friedrich Hayek's rejection of the concept of social justice:

"We are of course not wrong," [Hayek] says, "in perceiving that the effects of the processes of a free society on the fates of the different individuals are not distributed according to some recognizable principle of justice. Where we go wrong is in concluding from this that they are unjust and that somebody is to be blamed for this."

If Hayek is correct, then perhaps Alexander and Dagan's topic would not be such a good one after all. In such a world, the market would have no ethical challenges because it would have no ethics.

Hockett and Kreitner step in to defend this symposium's topic. Pushing back against Hayek and others, they observe that individual market transactions do not take place in a moral vacuum. "Market creation and market maintenance," they say, "are not the products of spontaneous genesis, but rather the product of institutional design, legislative action, and judicial decision." They then go on to unpack the concept of price, which stands at the heart of the system of buying and selling that many theorists treat as definitive of markets. They discuss the legal and institutional structures that generate prices, and the exploitative social relations that can taint them. What they are ultimately describing are the institutional decisions and moral preconditions for building the infrastructure of a market system worthy of our moral approbation. Rejecting Hayek's skepticism that we can even apply the language of justice to the output of decentralized markets, they make a strong case that the topic of this symposium is a meaningful and indeed unavoidable one.

Like Hockett and Kreitner, Avihay Dorfman also challenges the position that market relationships are necessarily—and properly—morally thin and impersonal. He asserts instead that, "a morally responsible agent cannot wash her hands of the conduct of another party to a market transaction (as the conventional wisdom implies); rather, she must decide whether or not to recognize the other party based, in part, on his relevant moral record." Dagan, in his paper, concurs, and he sets forth a positive case for market relationships as vital to our self-authorship. Market relationships accomplish this through their facilitation of mobility and through the ability they confer on us to enlist the cooperation of others in our long-term projects.

Despite their agreement on the notion that market relations have moral content, there seems to me to be a tension between Dorfman's view and Dagan's position that access to markets performs an important role in our self-authorship. After all, some of the people Dorfman would have us judge as unworthy of our market transactions are those who are attempting to engage in the kind of self-authorship that Dagan says the market exists to facilitate. Interestingly, they may even claim to be doing precisely what Dorfman urges—that is, they may be refusing to engage in market transactions because of what they perceive to be the moral shortcomings of certain market participants according to their own conception of the good.

The question is similar to the one raised in cases like *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, currently pending before the United States Supreme Court. In that case, the Court is considering a claim that a baker has a right to refuse to bake a cake because of his objection to same-sex marriage on the ground that (among other things) forcing the baker to sell the cake amounts to forcing him to endorse same-sex marriage.

One response to this sort of claim is to say that market relationships—like the selling of a cake—do not entail moral approbation of the person purchasing the cake. If serving someone in an arm's length transaction does not connote moral endorsement of them, then we can say that, in being forced to serve people of whom you disapprove—as service-providers are under civil rights laws—those service-providers are not being coerced to endorse a thick moral message with which they disagree. Dorfman would likely reject this strategy. He seems to want us to argue that the baker's disapproval of same-sex marriage is not worthy of moral or legal recognition. Dagan seems drawn to this view as well. Market participants, he suggests, may participate in markets in ways that foster their own self-authorship but they must not do so in ways that undermine the ability of others to do the same.

At an even more basic level, in order to understand the moral contours of market transactions, we need to grapple with the moral status of contract law and private property rights, both in ideal form and in their actual operation. For example, if—as some have argued—private ownership is never justifiable, then it is hard to see how a morally sound market system can get off the ground. But, even if private ownership is justified under certain circumstances in order to foster human flourishing, a market system may run afoul of the demands of justice if property is distributed in unjust ways or if private owners are permitted to make decisions that ultimately subvert human well being.

And so we are fortunate to have as part of the conversation Gregory Alexander's fascinating application of his "human flourishing" theory of

property to the right to destroy. In his contribution, Alexander applies this theory to the right to destroy and the duty to preserve in the disparate contexts of historic buildings, priceless art, and human reproduction. Across these varied examples, Alexander stakes out the view that autonomy and a thin conception of “social welfare” “do[] not exhaust what is really involved in such disputes.” Instead, he asserts, social welfare and autonomy are simply components of the more multifaceted notion of “human flourishing.” Drawing on Amartya Sen and Martha Nussbaum’s “capabilities” approach to human flourishing, Alexander urges property theorists to broaden their moral perspective beyond welfare and autonomy. Doing so, he argues, helps to shed important light on the rights and duties of owners.

Emily Sherwin’s exploration of the rationality of enforcing promises also grapples with the basic architecture of market transactions, though from the contract side of the equation. Sherwin’s conclusion is that prior promises provide only an imperfect case for the enforceability of those promises at a later time. Her discussion of the potential conflict between past promises and “current evidence about reasons for action” find echoes in Dagan’s discussion in his paper of the concept of “regret” and the need for ethically sound markets to protect the ability of market participants to modify their plans of self-authorship by exiting from the commitments they have entered into.

Turning from the conceptual underpinnings of markets, some of the papers explore the role that the economic superstructure of markets can play in bringing greater justice to the operation of markets. In her paper on “Risk, Culture, and Structure,” Saule Omarova explores the “critical role of industry wide structural factors in shaping individual firms’ internal cultural norms.” Those cultural norms, she argues, “respond to specific incentives generated within the[] surrounding institutional layers.” In adopting this approach, Omarova correctly suggests that—far from being neutral frameworks within which private actors express their values and pursue their interests—market structures even at the grandest scale themselves embed and express values. Consequently, she concludes, “in order to make individual banks’ internal ethical standards and cultural practices more ‘other-regarding’ and conducive to prudent risk-taking, it is critical to change how the broader institutional context . . . incentivizes continuous generation and amplification of socially excessive risk.”

Finally, implicit in the assertion that markets can be assessed as more or less just is the notion that markets should be subservient to moral constraints. And this in turn suggests that morality may make it inappropriate to engage in market transactions at all with regard to certain subjects. Several of the papers probe this interesting and important

question of the proper domain of market relationships. Because this is a highly contested question, the papers unsurprisingly reach a variety of conclusions about the potential for ethical markets in contexts touching on areas frequently thought of as falling outside of the proper ken of market considerations: familial and civic relationships.

Sital Kalantry's paper discusses the example of gestational care, and asks whether market transactions should properly encompass surrogacy contracts. She rejects the notion that there is one correct answer to this question for all times and places. Instead, adopting a highly contextual analysis of the dynamics of gestational care markets in India and the United States, she concludes that in some contexts, such markets are much more problematic than in others. Although she is broadly supportive of markets for gestational care, she argues that those markets require varying degrees of state oversight in different contexts. "Where a regulatory regime should land on the contract-freedom spectrum depends," she concludes, "on an evaluation of the circumstances of the country."

Daphna Hacker, in her paper on familial ethics, begins with a contrast between the "ethic of the market" and the "ethic of the parent-child relationship." Drawing on this distinction, she considers the phenomena of (on the one hand) child labor, and (on the other) parents who emigrate without their children in order to send earnings back home. Like Kalantry, she believes that the implications of this distinction for specific policy prescriptions turn on context. Although conventional wisdom treats child labor as always wrong and parental remittances as morally unproblematic, Hacker aims to reverse this judgment, at least in certain contexts. She calls for a "pluralist and contextual continuum approach that can better serve the needs of children." Applying such an approach to the circumstances facing parents and children in poor countries, she argues, means that—under the right circumstances—permitting child labor might do more to protect children than policies that encourage parental emigration.

As with Kalantry and Hacker, Hila Shamir, Tsilly Dagan and Ayelet Carmeli, eschew one-size-fits-all prescriptions in their own paper on gender equality in familial care. Instead, they argue that brittle dichotomies and rigid preconceptions about the propriety of market transactions in discussions of family care stand in the way of potentially effective hybrid strategies for promoting autonomy, efficiency and distributive justice. "We see public and private not as opposing rival worlds which demand either-or selection, but rather as offering a wide array of different possible combinations in which private and public features and mechanisms are combined to recreate public-private hybrids that are neither purely public nor exclusively private." They point to state subsidies for intra-household care for children as an example of such a hybrid strategy that

straddles the divide between state and market provision of these important services. These hybrid strategies will aim—they argue—“to take the virtues of each institution . . . and minimize its drawbacks.”

Finally, two papers explore the boundary between market relationships and civic relationships. Tsilly Dagan and Talia Fisher explore this boundary through the lens of the state-citizen relationship, and they observe that the conceptual distinctions between market and state are more porous than we might initially imagine. In a decentralized global order characterized by competition among states, they argue, states “compete for capital and human resources by offering their public goods and political participation for sale,” sometimes on an a la carte basis. Laura Underkuffler explores similar questions through the lens of the phenomenon of corruption—the buying and selling of state actors’ honest services. Corruption flourishes, she argues, when the market reaches beyond its proper limits into the domain of the public interest—“when the lines between public interests and unrestrained self-seeking are blurred.”

All of these thoughtful discussions suggest—consistent with the thrust of Hockett and Kreitner’s paper, with which I began—that we cannot hope to understand the market without considering the background economic and legal infrastructure within which market transactions take place. As one of many possible systems for governing certain types of interactions among individuals and within communities, the market itself represents a set of moral commitments. Those commitments include the structure of permissible market transactions, the values of market participants, and the proper scope of the market itself. Put another way, the subject of this symposium—the ethical challenges of the marketplace—might well be reframed as the study of the market itself, full stop.